University of Miami Law Review

Volume 32 | Number 1 Article 8

12-1-1977

Pregnancy Disability Benefits Denied: Narrowing the Scope of Title VII

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Pregnancy Disability Benefits Denied: Narrowing the Scope of Title VII

In a recent decision the Supreme Court held that a private employer's disability benefits plan which excluded pregnancy benefits was not discriminatory under Title VII. Although purporting to apply traditional Title VII standards, the Court in fact used an equal protection analysis. The author criticizes this approach and points out the Court's failure to consider facts critical to a comprehensive analysis of the issue.

Seven employees of the General Electric Co. instituted a class action[1] against General Electric in the United States District Court for the Eastern District of Virginia. The plaintiffs sought declaratory and injunctive relief and damages, alleging that General Electric had engaged in sex discrimination violative of Title VII of the Civil Rights Act of 1964.[2] The employment practice attacked as unlawful under Title VII was the exclusion of pregnancy-related disabilities from General Electric's short term non-occupational sickness and accident disability plan. The District Court found the exclusion to be the result of deliberate sex discrimination.[3] On appeal, the United States Court of Appeals for the Fourth Circuit affirmed, pronouncing General Electric's policy to be discrimination that was "inextricably sex-linked" in its consequences.[4] The United States Supreme Court granted certiorari and *held* in the first pregnancy case it decided under Title VII, reversed: General Electric's exclusion of pregnancy-related disabilities from its temporary disability plan does not constitute gender based discrimination in violation of Title VII of the Civil Rights Act of 1964.[5] *General Electric Co. v. Gilbert,* 97 S.Ct. 401 (1976).

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1. The district court certified two classes. All female employees of General Electric employed on or after September 14, 1971 constituted the class seeking injunctive and declaratory relief. The sub-class suing for damages was comprised of female employees denied pregnancy disability benefits beginning September 14, 1971. Gilbert v. General Electric Co., 375 F.Supp. 367, 369 (1974).

2. 42 U.S.C. § 2000e (1970).

3. 375 F.Supp. at 386.

4. 519 F.2d 661, 664 (1975).

5. There was strong congressional disapproval immediately following the *General Electric* decision. The Senate passed an amendment to Title VII which essentially overrules the *Gilbert* decision. 123 CONG. REC. S15059 (daily ed. Sept. 16, 1977).

A New York case decided after *General Electric* held the denial of disability benefits to private pregnant employees to be unlawful under the state's Human Right's Law which is

The integration of women into the labor force on a parity with men has been an arduous process. The familiar maxim, "a woman's place is in the home," has been so ingrained in our perception of family life that the working woman has been traditionally considered an anomaly. It is axiomatic that the capacity of the female to become pregnant and bear children has forged the concept of the misplaced woman in the working world who will retire permanently once her children are born.[6] This perception continues to be reflected in the inferior economic position occupied by the female worker[7] notwithstanding her sometimes superior educational background.[8] Employers have historically justified the economic disparity between male and female employees on the basis of the transient nature of women in the work force. However, such transience is often the direct result of restrictive employment practices applied exclusively to women.[9] While the fourteenth amendment, the Equal Pay Act,[10] and Title VII have eliminated many employment practices which penalize women because of their child bearing potential, some discriminatory practices have continued.

Title VII of the Civil Rights Act of 1964 was enacted by Congress to remove the impediments to employment opportunities that exist for individuals because of their race, color, religion, sex, or

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worded similarly to Title VII. *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 390 N.Y.S.2d 884 (1976).

6. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding the constitutionality of an Oregon statute limiting a female employee's work day to ten hours because of her "maternal functions"); Hodgson v. National Bank of Sioux City, 460 F.2d 57, 62 (8th Cir. 1972) (where the employer admitted maintaining a policy which precluded female employees from joining a management training program because of the possibility of marriage and a family).

7. WOMEN'S BUREAU, U.S. DEPT. OF LABOR, BULL. NO. 294, HANDBOOK ON WOMEN WORKERS at 178 (1969).

8. The median income for fulltime female employees in the United States is 58.5% of that of comparable male employees. H. REP. No. 92-238, 82d Cong., 2d Sess. *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2140.

9. Employer practices relating to pregnant employees, such as termination and forced maternity leave with loss of seniority status, have caused transiency by female employees. *See Hearings on H.R. 3861 Before the Special Subcomm. on Labor*, 88th Cong., 1st Sess. 139, 194, 243, 252, 258-59 (1963); *Hearings on S. 882 and S. 910, Before the Senate Subcomm. on Labor of the Comm. on Labor* (Public Welfare) 88th Cong., 1st Sess., 142, 145 (1969); 100 CONG. REC. 9205; Brief For Respondent at 116, General Electric Co. v. Gilbert, 97 S.Ct. 401 (1976). For a discussion of discrimination against pregnancy see Koontz, *Childbirth and Leave: Job-Related Benefits*, 17 N.Y.L.F. 480 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. LIB. L. REV. 260 (1972).

Currently 60% of all private employers provide six weeks of disability benefits for pregnancy. Brief For Respondent at 52. If the General Electric decision had gone the other way, this coverage would have had to be increased to the number of weeks of coverage provided for other temporary disabilities (generally twenty-six weeks).

10. 29 U.S.C. § 206(d) (1970).

national origin.[11] Title VII is a legislative mandate to private employers to consider the capabilities of individuals when making employment decisions rather than basing such decisions on unjustified group stereotypes. In order to effectuate its goal, Congress passed comprehensive legislation to eliminate discrimination that might exist in every phase of the employment scheme including the compensation, terms, conditions, and privileges of employment.[12] In

11. H. REP. No. 914, U.S. CODE CONG. & AD. NEWS, 2401 (1964). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, 806 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971); Note, *Developments in Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1175 (1971). There is virtually no legislative history surrounding the inclusion of sex as a protected class under Title VII. The proposal for the addition of sex to Title VII was prompted by the hope that the addition would insure defeat for the entire bill. *See* 110 CONG. REC. 2577 (1964); Comment, *Sex Discrimination Unemployment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 676-77. For the legislative history of Title VII, see Vaas, *Title VII: Legislative History*, 7 B.C. INC. & COM. L. REV. 431 (1966). However, extensive congressional hearings dealing with sex discrimination were held in conjunction with the passage of the Equal Pay Act, 29 U.S.C. 206(d), one year prior to the Civil Rights Act. The legislative history of the Equal Pay Act is a useful aid in construing congressional intent of Title VII. *Legislative History of the Equal Pay Act of 1963* (printed for use of Committee on Education and Labor) S. REP. No. 176, 88th Cong., 1st Sess. 687 (1963). *See* General Electric Co. v. Gilbert, 519 F.2d at 667 n. 22; Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (reading the statutes in *pari materia)*; Brief for Respondent at 120-28, General Electric Co. v. Gilbert, 97 S.Ct. 401 (1976); Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U. L. REV. 326 (1971); Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L. J. 305, 344-46 (1968); Margolin, *Equal Pay and Equal Opportunities for Women*, N.Y.U., 19th Conference on Labor, at 297 (1967). Furthermore, it would be anomalous to distinguish the congressional purpose of Title VII as it relates to sex from the other classes in view of the inclusion of sex on a parity with the other classes throughout the statute. *See* Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, (1975) where the court stated: "The language of the Supreme Court in *Griggs* regarding racial discrimination applies with equal (but not greater) force to sexual discrimination . . . ." 507 F.2d at 1091; Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971). "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L. J. 305, 312 (1968).

12. 42 U.S.C. § 2000e-2(a)(1). The subsection states:

> (a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

General Electric argued that incidents of a job such as employee benefits are less significant than employment opportunities and are, therefore, accorded less protection under Title VII. Brief For Petitioner at 53-54, General Electric Co. v. Gilbert, 97 S.Ct. 401 (1976). However, the statutory language specifically includes benefits of employment and indicates no discrepancy in the protection provided by Title VII between job benefits and job opportunities. In addition, the Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(a)(b)(1973), issued by the Equal Employment Opportunity Commission dealing with fringe benefits provide that:

1972 Congress amended Title VII to extend its protection to state employees to insure that all individuals belonging to a protected class receive individual assessment of their capabilities in the employment world.[13]

Under Title VII an employer is prohibited from implementing employment practices which discriminate against employees belonging to a protected class. An employment practice is discriminatory under Title VII standards when it differentiates between employees on the basis of race, color, religion, sex, or national origin. The courts have recognized that such discrimination may be apparent on the face of the employment practice or that a discriminatory intent may lie behind a facially neutral employment practice. Furthermore, the Supreme Court in *Griggs v. Duke Power Co.*[14] clearly articulated a third touchstone for determining discrimination in a Title VII case. Although a practice may be neutral on its face and in its intent, if it has differential impact on a protected class it violates Title VII. Thus, a plaintiff in a Title VII case need not show discriminatory intent to establish a prima facie violation if the discriminatory effect of the challenged practice can be demonstrated. Upon a showing of a prima facie violation of Title VII the only defenses available to the defendant-employer are the statutory bona fide occupational qualification defense,[14.1] which has been strictly construed, and the judicially created business necessity defense.[14.2] In contrast to the three-pronged discrimination test of Title VII, equal protection analysis requires a two-pronged test whether under the fifth or fourteenth amendment. Since Title VII is a statute

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(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

If employers were permitted to differentiate the quality and quantity of employment benefits provided to employees with the same jobs on the basis of race, color, religion, sex, or national origin, the purpose of Title VII would be circumvented. Although individuals belonging to such groups would be provided with the same job opportunities as others, the benefits and other conditions surrounding their employment could be made so inferior to those provided non-minority employees that they would be induced not to accept the job or to leave the job. Inferior job benefits would cause financial hardship for minority group workers that is not experienced by similarily situated non-minority employees. Thus, an employer could accomplish indirectly what he could not do directly. Title VII protection does not cease with providing a protected individual with an equal opportunity to obtain a given job, but rather requires that all employees are entitled to the same benefits incident to that given job to insure the complete integration of minority groups into the labor force.

13. 42 U.S.C. § 2000e-(a)-(b), (Supp. II 1972) *amending* 42 U.S.C. § 2000e-(a)-(b) (1970).

14. 401 U.S. 424 (1971).

14.1 42 U.S.C. 2000e-2(e) (1970).

14.2 *See* note 66 *infra*.

specifically enacted to alleviate discrimination in the world of private employment, and equal protection is a constitutional concept designed to protect citizens from all acts of discrimination by federal and state governments, the judicial analysis employed in allegations of violations of the two must necessarily differ. Last term in *Washington v. Davis*[15] the Supreme Court noted the difference between the Title VII and equal protection standards of discrimination and held that, unlike Title VII cases, a showing of discriminatory effect was insufficient to establish a violation of equal protection. A plaintiff in an equal protection case must evidence discriminatory intent in order to demonstrate that a facially neutral practice is discriminatory.

In addition to the dichotomy that exists in establishing discrimination under Title VII and equal protection, the analysis also differs once discrimination has been demonstrated. Unlike Title VII which provides limited defenses, a discriminatory practice may be upheld under equal protection analysis depending on the class involved. Classifications by race, color, religion or national origin can be justified only by a compelling state interest employing the least restrictive means of promoting that interest.[15.1] Gender classifications in the past have been subjected to minimal scrutiny which involves a legitimate state interest using means rationally related to further that interest.[15.2] However, the present judicial standard in sex cases appears to be a hybrid form of analysis, a "strict rational", which focuses on whether the classification used by the legislature bears a "fair and substantial relation to the object of regulation."[15.3]

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15. 96 S.Ct. 2040 (1976).

15.1 *Loving v. Virginia*, 388 U.S. 1 (1967); *Oyama v. California*, 332 U.S. 633 (1948). For classifications by religion, see *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (dictum) (religion and race).

15.2 *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesart v. Cleary*, 335 U.S. 464 (1948); *Muller v. Oregon*, 208 U.S. 412 (1908).

15.3 *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. vv. Virginia*, 253 U.S. 412, 415 (1920)). For a discussion of this new form of judicial scrutiny, see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Kahn v. Shevin—*Sex: A Less-Than-Suspect Classification*, 36 U. PITT. L. REV. 584 (1974); Note; Kahn v. Shevin *and the "Heightened Rationality Text": Is the Supreme Court Promoting a Double Standard in Sex Discrimination Cases*, 32 WASH. & LEE L. REV. 275 (1975); *Gender in Sup. Ct. 1973 & 74*, SUP. CT. REV. (1975). In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of the Court found classifications based upon sex to be suspect triggering strict judicial scrutiny. All other recent cases, however, have been examined under the hybrid type of judicial scrutiny. *See Califano v. Goldfarb*, 97 S.Ct. 1021 (1977); *Craig v. Boren*, 97 S.Ct. 451 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975) (irrational classification under any test). For a general discussion of the Court's treatment of sex discrimination, see Johnston, *Sex Discrimination and the Supreme Court-1975*, 23 U.C.L.A.L. REV. 235 (1975); Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617 (1974).

The essential difference between the Title VII and the equal protection analysis is that a state may lawfully engage in practices which have a discriminatory impact (if discriminatory intent is absent) and further may, depending on the class and circumstances, be justified in engaging in discriminatory practices (either on their face or intent) because of its responsibility to promote the social welfare of its citizens. However, a private employer is prohibited from engaging in practices which have a discriminatory impact on a protected class unless the circumstances absolutely compel such disparate treatment and the practice involved produces the least amount of discrimination possible under the circumstances.

We turn now to an examination of the cases involving employment practices relating to pregnant women analyzed under the differing standards of equal protection and Title VII.

In *Cleveland Board of Education v. LaFleur,*[16] the Supreme Court was faced with the problem of deciding the constitutionality[17] of a school board regulation which required a pregnant teacher to go on unpaid maternity leave from the end of her fourth month of pregnancy until three months after the birth of her child. The Court found that the mandatory leave policy constituted an arbitrary cut-off date violative of the due process clause of the fourteenth amendment. Such a regulation created an irrebuttable presumption that all pregnant teachers were incapacitated five months before the expected births of their children.[18] In addition to precluding individual determination of physical ability, the regulation unduly burdened a female's constitutionally protected right to bear a child.[19]

Last term the Court carried the reasoning of *LaFleur* one step further in *Turner v. Department of Employment Security and*

16. 414 U.S. 632 (1974).

17. Since the plaintiffs in *LaFleur* were placed on maternity leave prior to the extension of Title VII to state agencies, the attack was on the constitutionality of the regulation under the fourteenth amendment. Nevertheless, Justice Stewart, the author of the opinion, noted the applicability of Title VII and the EEOC's guidelines to similar suits in the future. 414 U.S. 632, 638 n.8 (1974). Justice Stewart cited 29 C.F.R. § 1604.10 (1973) which provides that a mandatory leave or termination policy because of pregnancy presumptively violates Title VII.

18. Justice Powell concurred in the result but felt that equal protection analysis was appropriate. Furthermore, he found the gender classification to be irrational and never reached the problem of which standard of analysis was required for equal protection. 414 U.S. at 651.

In his dissent, Justice Rehnquist criticized the use of the irrebuttable presumption doctrine as an attack on the legislative process itself. He maintained that since physical impairment increases as pregnancy advances, the legislature is free to draw the line as it did in *LaFleur.* 414 U.S. at 657.

19. 414 U.S. at 640, 651. *See* Skinner v. Oklahoma, 316 U.S. 535 (1941).

Board of Review of the Industrial Commission of Utah.[20] In a *per curiam* opinion the Court held a provision of the Utah unemployment compensation law violative of due process. The law denied unemployment benefits to pregnant women who had stopped working for reasons unrelated to their pregnancy, for a period beginning twelve weeks before and extending to six weeks after their expected date of delivery. As in *LaFleur,* this provision created an irrebuttable presumption of physical impairment for a period of eighteen weeks. Due process, stated the Court, requires individual treatment when the basic freedom of procreation is at issue.[21]

The corollary problem to forced maternity leave settled in *LaFleur* and developed in *Turner* is whether pregnant employees on maternity leave are entitled to disability payments pursuant to their employer's disability plan. The issue first arose in *Geduldig v. Aiello*[22] which involved a temporary disability plan administered by the state of California for the benefit of private employees.[23] The plan was wholly financed by employee contributions with no involvement by the private employers. The plan covered disabilities arising from a substantial number of mental and physical illnesses and injuries, but precluded coverage for disabilities accompanying normal pregnancy.[24] The Supreme Court upheld the statute and found that there was no invidious discrimination violative of the equal protection clause of the fourteenth amendment.[25] Traditional

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20. 96 S.Ct. 249 (1975).

21. 96 S.Ct. at 250-51. The state argued in *Turner* that the provision in issue was merely the result of the financial inadequacy of the state to cover all unemployment compensation rather than unavailability of benefits based on pregnancy. The Court rejected this argument because it was only raised on appeal. 96 S.Ct. 249, 250 n.* (1975). It is this type of argument, however, which the same Court accepted twelve months later in *General Electric. See* the discussion *infra* in the text.

22. 417 U.S. 484 (1974).

23. Participation in the plan was mandatory if the private employee was not covered by a state approved private plan. Each employee contributed one percent of his salary up to a yearly maximum of $85. Temporary disabilities incurred which were not covered by Workmen's Compensation were covered for up to twenty-six weeks beginning on the eighth day after the disability began or on the first day of hospitalization, whichever came first. All payments were made from employee contributions and the amount of the payments corresponded to the contributions made by the particular employee receiving benefits. CAL. UNEMP. INS. CODE § 2626, *as amended by* § 2626.2.

24. Originally the plan precluded coverage for any injury or illness caused by or arising in connection with pregnancy until a lapse of twenty-eight days following termination of the pregnancy. Three of the original plantiffs who experienced complications during abnormal pregnancies were denied coverage. Prior to adjudication by the Supreme Court, however, the California statute was ameded so that only disabilities associated with normal pregnancy were exempted so the issue was moot as to three of the original plaintiffs.

25. Title VII was inapplicable in *Geduldig* because it involved a state disability plan for private employees. Title VII covers state employees receiving disability benefits from the state or private employees receiving such benefits from their employers.

equal protection analysis[26] was employed by the Court: since the state of California had a legitimate interest in maintaining the fiscal integrity of the program, the exclusion of one risk of disability, pregnancy, was a rational means used by the legislature in promoting that interest.[27] The problem with the *Geduldig* analysis, however, is that the Court failed to unambiguously state whether the pregnancy classification created by the California statute constituted a gender-based classification or merely a classification by physical condition.[28] Justice Brennan, in his dissent,[29] construed the majority opinion as finding the plan's exclusion of disabilities resulting from normal pregnancy to entail sex discrimination. His criticism of the opinion lay in the use of the rational basis test to evaluate the validity of the statute. He felt that prior cases mandated that a stricter standard of judicial scrutiny be applied to the sex classification and that the statute could not survive such a heightened scrutiny.[30] The majority confined its rebuttal of Brennan's dissent to a footnote,[31] and indicated that the pregnancy clas-

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26. *See* note 15.2 *supra*, and accompanying text.

27. 417 U.S. at 496.

28. *See generally* Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975); Note, *Pregnancy and Sex-Based Discrimination in Employment: A Post-Aiello Analysis*, 44 U. CIN. L. REV. 57 (1975).

29. 417 U.S. at 497 (joined by Justices Douglas and Marshall).

30. 417 U.S. at 502-04. Brennan cited Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), as requiring a stricter standard for evaluating a legislative classification based on gender. Brennan reiterated his position in *Frontiero* that classifications based on gender, like race, were inherently suspect. 417 U.S. at 503. *See* note 15.3 *supra* and accompanying text. Brennan cited with approval the EEOC guidelines promulgated in connection with Title VII, 29 C.F.R. § 1604.10(b) (1972), which state disabilities caused by pregnancy should be treated as other temporary disabilities for all job-related purposes. 417 U.S. at 502.

31. The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, (1971), and Frontiero v. Richardson, 411 U.S. 677, (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divided potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes

sification created by the California statute was not gender-based but rather a classification involving a physical condition. Since there was no showing that the pregnancy exclusion was a "mere pretext designed to effect an invidious discrimination"[32] against women, the Court determined that the exclusion did not violate the fourteenth amendment. By not clearly stating whether pregnancy classification is a gender-based classification, the Court left the central issue unresolved.

The *Geduldig* decision provided that a state disability plan created for the benefit of private employees could legitimately exclude disabilities related to normal pregnancy. However, it left unanswered the question of whether a private employer could exclude coverage from a similar plan pursuant to Title VII. The five courts of appeals[33] which have dealt with this issue have found such disability plans to violate Title VII. The Supreme Court[34] found *Geduldig* to be dispositive and thus found the challenged General

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members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. 484, 496 n.20.

32. *Id.*

33. Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975) (both these cases dealt with the disallowance of use of accumulated sick leave during maternity leave but the courts treated the issue as analogous to the exclusion of pregnancy from a disability plan); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975); Communications Workers of America v. A.T.&T. Co., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds*, 424 U.S. 736 (1976). *Satty, Hutchinson, Communications Workers* and *Wetzel* distinguished *Geduldig* on the grounds that it involved a constitutional issue in contrast to a question of statutory interpretation. Furthermore, the courts cautioned against overemphasis of the importance of *Geduldig's* footnote 20. The Court of Appeals in *General Electric* read *Geduldig* as finding that sex discrimination resulted from the California disability plan but that the discrimination was justified within the social and welfare context from which it arose. 519 F.2d at 666-67.

In addition, in Tyler v. Vickery, 517 F.2d 1089, 1097-98 (5th Cir. 1975), which involved the constitutionality of the Georgia bar examination, the court stated that the standards for determining discrimination under Title VII and the fourteenth amendment differ. The *Tyler* court specifically cited the failure of the *Geduldig* Court to discuss the relationship between the Title VII and fourteeth amendment standards as support for its position that the Title VII standards are irrelevant in determining the constitutionality of an allegedly discriminatory state practice. *See* also Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975) (employer policy of discharging pregnant employees constitutes unlawful sex discrimination under Title VII). For a discussion of the interplay of the Equal Rights Amendment with pregnancy classifications see, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COL. L. REV. 441, 471-81 (1975). For a projection of the effect of the Equal Rights Amendment, see Parts IV and V of Brown, Emerson, Falk, Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 909-80 (1971).

34. Justice Rehnquist wrote the majority opinion joined by Chief Justice Burger and Justices White, Powell, and Stewart (concurring). Justice Blackmun concurred in part.

Electric plan in *General Electric Co. v. Gilbert* lawful under Title VII.[35]

The Court begins its examination of the GE plan[36] by determining whether the plan is facially discriminatory. Since "discrimination" was left undefined by Congress when it enacted Title VII, the Court reasons that the judicial construction given to it under the equal protection clause in the fourteenth amendment could be utilized in discerning its meaning for Title VII purposes. Therefore, the gender discrimination analysis of *Geduldig* which dealt with a similar disability plan[37] is apposite. The Court relies on footnote twenty[38] to read *Geduldig* as standing for the proposition that a virtually all inclusive disability plan which excludes pregnancy from its coverage is a classification based upon a physical condition rather than gender.[39]

Since the GE plan, like the California plan in *Geduldig,* created no distinction between the coverage provided to both sexes for the included disability risks, the Court concludes the plan is facially neutral.[40] In addition, the Court characterizes pregnancy as being a "unique" and voluntary condition[41] distinguishable from other covered disabilities.[42] Therefore, the exclusion of pregnancy-related disabilities by General Electric was not a "simple pretext for discriminating against women."[43] Although the Court recognizes that a

35. A discriminatory employment practice based on race, color, religion, sex, or national origin is a prima facie violation of Title VII. *See* 42 U.S.C. 2000e-2(a) (1970). Generally, such discrimination can be established by a showing that the challenged employment practice is discriminatory on its face, in its intent, or in its effect. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). A prima facie case can be rebutted by demonstration of a bona fide occupational qualification or business necessity.

36. The General Electric Weekly Sickness and Accident Insurance Plan (General Electric is in effect self-insured) provided payments in the amount of sixty percent of the employee's weekly wages up to a maximum of $150 per week for virtually all nonoccupational disabilities except those which were pregnancy-related. In contrast, the California plan in *Geduldig* (*see* n.23 *supra)* only excluded disabilities arising from *normal* pregnancy; the General Electric plan excluded *all* pregnancy related disabilities. Payments under the GE plan continued for up to twenty-six weeks beginning on the eighth day of disability or the first day of hospitalization, whichever occurred first.

37. 97 S.Ct. at 407.

38. *See* n.31 *supra.*

39. 97 S.Ct. at 407-08.

40. 97 S.Ct. at 408.

41. *Id.* The district court found that pregnancy was usually voluntary, although a substantial number of pregnancies were accidental or resulted through negligence. The district court also found pregnancy was not a disease per se. 375 F. Supp. 367, 377 (1974).

42. 97 S.Ct. at 408. The Court found that exclusion of pregnancy related disabilities from the facially neutral plan was *based* on a neutral criterion rather than a discriminatory intent which would have violated Title VII.

43. *Id.* This was the intent test enunciated in *Geduldig* for finding a sexually neutral classification to violate equal protection. 417 U.S. at 496-97 n.20.

prima facie violation of Title VII can be established by proof of the discriminatory effect[44] of a facially neutral plan—even in the absence of dicriminatory intent[45]—the Court does not apply the effect test in any discernable manner.[46]

Since the Court never makes the threshold finding that the General Electric plan constitutes sex discrimination, there can be no finding of an unlawful employment practice under Title VII. The Court buttresses its holding by rejecting the guideline promulgated by the Equal Employment Opportunity Commission (EEOC), the agency charged with interpreting Title VII,[47] which states that disabilities due to pregnancy should be treated as any other temporary disability for purposes of disability plans.[48] The Court does not attach great weight to the EEOC guideline in determining the legislative intent of Title VII because of the guideline's inconsistency with the prior position taken by the EEOC.[49] Furthermore, the Court notes the eight year lapse from the time of the statute's enactment until the guideline's issuance.[50] Finally, the Court cites a conflicting regulation issued by the Wage and Hour Administrator under the Equal Pay Act[51] as a justification for rejecting the EEOC guideline.

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44. 97 S.Ct. at 408-09 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

45. To establish that a facially neutral classification violates equal protection, proof of a discriminatory intent is necessary. Washington v. Davis, 96 S.Ct. 2040, 2051 (1976).

46. The portion of the opinion which purports to apply the effect test merely expounds on the Court's discussion of the facial neutrality of the plan.

47. 42 U.S.C. § 2000e-5 (Supp. VI 1976); 42 U.S.C. § 2000e-12(a) (1970). The Court distinguished EEOC guidelines from those issued pursuant to enabling statutes. 97 S.Ct. at 411.

48. 29 C.F.R. § 1604.10 (1973). The EEOC guideline provides that:

> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as . . . payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

49. *See* letter by General Counsel of EEOC (10/17/66), EMPL. PRAC. GUIDE, (CCH), ¶ 17,304.43 (1970).

50. The Court cited Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) as providing the test for the amount of weight to afford the guideline. To be considered are 1) "the thoroughness evident in its consideration; 2) the validity of its reasoning; 3) its consistency with earlier and later pronouncements; and 4) all those factors which give it power to persuade, if lacking power to control." The Court rejected the guideline on the basis of factor 3 and totally disregarded factors 1, 2, and 4. *See* note 102 and accompanying text *infra*.

51. 29 C.F.R. § 800.116(d) (1975) provides:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits

Justice Stevens' dissent[52] does not come to grips with the approach taken by the majority. The issue presented in the case as perceived by Stevens is purely one of statutory interpretation, uncomplicated by the social and precedential underpinnings apparent in the majority[53] opinion and the powerful dissent written by Brennan. Stevens finds *Geduldig* inapposite because it is based on the fourteenth amendment which, he maintains, requires more stringent standards of proof to make a prima facie case of discrimination than does Title VII.[54] By rejecting the cornerstone of the majority opinion, Stevens is free to proceed without confronting the arguments presented by the majority. Since the GE plan singles out *only* risk of absence due to pregnancy for differential treatment and *only* women can become pregnant, Stevens finds the plan to be facially discriminatory.[55] By concluding that the plan is facially discriminatory, Stevens avoids dealing with the effect test enunciated in *Griggs*[56] and the weight to be accorded the EEOC guideline. The

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which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of § 6(d) if the resulting benefits are equal for such employees.

The Court noted the relationship between Title VII and the Equal Pay Act. *See* n.11 *supra*. Furthermore, under Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1970), an employer does not violate Title VII if he differentiates the amount of compensation provided on the basis of sex as long as he does so in accordance with § 206(d) of the Equal Pay Act, 29 U.S.C. 206(d) (1970).

52. 97 S.Ct. at 420-21.

53. 97 S.Ct. at 406. The Court recognized the finding of the district court, 375 F.Supp. at 378, that the inclusion of pregnancy benefits would increase General Electric's disability plan costs by a substantial amount. The justification for the California plan in *Geduldig* was premised on the increased cost which would result from the inclusion of such disabilities. 417 U.S. at 492-94.

54. 97 S.Ct. at 420. Stevens relied on Washington v. Davis, 96 S.Ct. 2040 (1976).

55. General Electric did not plead a defense, (neither bona fide occupational qualification or business necessity), so Steven's analysis ends once he has found that the GE plan entails sex discrimination.

56. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The *Griggs* test is applied to an employment plan which, although neutral on its face, is alleged to violate Title VII because of its discriminatory effect on a protected class. As Stevens noted, a plan which distinguished absences on the bases of neutral criteria such as voluntariness or overwhelming cost, would be analyzed under the *Griggs* test to determine if it had a discriminatory impact. The GE plan was not based on such criteria. Although the majority distinguished the plan as not being discriminatory in intent, the reasoning is erroneous. Not only did the GE plan include some voluntary disabilities, *see* n.69 and accompanying text *infra*, refuting any claim of voluntariness as a criterion for the pregnancy exclusion, but "sex-plus" distinctions are also violative of Title VII. Employment practices which distinguish between employees on the basis of gender, plus an additional characteristic, constitute sex discrimination. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (holding an employer could not refuse to hire women with pre-school children when men with pre-school children were hired); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) (holding an employment practice of discharging married stewardesses while maintaining married male flight attendants violated Title VII).

Griggs test is applied to an employment plan which, although neutral on its face, is alleged to violate Title VII because of its discriminatory *effect* on a protected class.

Brennan's masterful dissent[57]—in contrast to Stevens' more simplistic approach—confronts the majority on a point to point basis. Brennan acknowledges that the conceptual framework used by the majority is diametrically opposed to that used by the plaintiffs and ultimately adopted by him. The majority professes to look at the GE plan as an arm's length contractual relationship adopted through the process of collective bargaining in which the employees are represented by unions, and, in which a series of benefits are agreed upon. However, due to the financial constraints of the employer, both parties recognize that not all benefits desired by all employees will become part of the final employment package. Rather, only those benefits which the union considers most important will be included.[58] Therefore, the majority contends that to determine if the plan is discriminatory the analysis must focus on the benefits adopted rather than on those excluded. As Brennan notes, such an approach allows any cause of disability unique to one sex or race[59] to be excluded from a disability plan without violating Title VII provided that all employees could receive payments for disabilities included in the plan.

Brennan rejects the majority interpretation of *Geduldig* and states that at most *Geduldig* holds "that a pregnancy classification standing alone cannot be said to fall into the category of classifications that rest explicitly on 'gender as such'".[60] Therefore, he views *Geduldig* as having very limited application to the instant case. It is puzzling that Brennan even makes this concession to the majority. He appears to recede from his dissent in *Geduldig* which presupposed that the California disability plan created a gender-based

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In addition, a proposed amendment to section 703 of Title VII which would have made discrimination illegal only if based "solely" on race, color, religion, sex, or national origin was defeated. 110 CONG. REC. 2728 (1964). So even if voluntariness was a neutral criterion upon which the GE plan was based, this does not save the plan since pregnancy is sex specific.

For a discussion of "sex-plus" distinctions, see Comment, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1171 (1970); 51 N.Y.U.L. REV. 148, 160-62 (1976).

57. 97 S.Ct. at 413-20.

58. Although not expressly stated in the majority opinion, the concept of collective bargaining and financial limitations faced by the employer is implicit in the decision. Indeed, the Court relies on the financial aspects involved to bolster its holding. Such considerations explain the approach of the Court in looking at the included benefits rather than those excluded. *See* 375 F. Supp. at 370-71; Brief for Respondent at 54.

59. E.g., hysterectomy, prostatectomy, sickle cell anemia.

60. 97 S.Ct. at 414 (citing Geduldig v. Aiello, 417 U.S. at 496 n.20).

classification.[61] Furthermore, Brennan's statement about *Geduldig* creates uncertainty as to when a pregnancy classification is to be treated as a sex classification.

However one reads the *Geduldig* opinion there is another aspect of the case that the majority fails to treat adequately. *Geduldig* specifically left open the case where a pregnancy-related classification for disparate treatment is used as a pretext for sex discrimination.[62] Thus, a facially neutral disability plan would be impermissible if it evidenced a discriminatory intent.[63] The majority fails to address the question of intent. Brennan concurred with the district court finding that the evidence of General Electric's past and present policies toward female employees revealed a discriminatory attitude towards women and that this was a "motivating factor" in its disability plan.[64]

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61. *See* n.30 *supra.*

62. In *Geduldig* the majority decided that evidence of discriminatory intent was absent. For purposes of analysis in *Gilbert,* Brennan agrees that the California plan was the product of neutral actuarial principles (97 S.Ct. 414), although in his dissent in *Geduldig* Brennan specifically pointed out that the plan was *not* based on actuarial data since all the beneficiaries of the plan contributed at the same rate, notwithstanding the difference in group. 417 U.S. 494, 499 n.2 (1974).

63. The part of the *Geduldig* opinion relating to discriminatory intent is consistent with equal protection analysis. *See* Washington v. Davis, 96 S. Ct. 2040 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Private suits challenging employment practices as discriminatory under Title VII are based on § 706(a), 42 U.S.C. § 2000e-5(a) (1970), which provides equitable relief in the event it is determined that the employer "has intentionally engaged in or is intentionally engaging in" an unlawful employment practice. Intent has not been construed to mean subjective intent; rather objective intent. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir. 1971). The focus is on the *consequences* of a particular employment practice, not the motivation. *Griggs,* 401 U.S. at 430.

64. 97 S. Ct. at 415 n.1 (citing 375 F. Supp. at 383). The district court found the General Electric plan to be facially discriminatory. 375 F. Supp. at 380-82. The court noted that General Electric had been aware of the EEOC guidelines and had failed to comply with them. 375 F. Supp. at 385. The court cited General Electric's past practices as evidence of discriminatory intent. When General Electric instituted its disability coverage, it excluded female employees because "women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the Company." 97 S.Ct. at 415 n.1 (citing D. LOTH, SWOPE OF GENERAL ELECTRIC: STORY OF GERALD SWOPE AND GENERAL ELECTRIC IN AMERICAN BUSINESS (1958)). General Electric had a policy of paying female employees two-thirds of the wages paid their male counterparts. *See General Electric Co.,* 28 War Lab. Rep. 666 (1945) (quoting a General Electric job manual). The justification for this policy offered by General Electric was the increased cost in employing females, including payment of pregnancy disability benefits which the company never paid. 97 S.Ct. at 415 n.1. In 1970 and 1971 the straight time hourly wage rates of female employees was less than 75 percent than that of males. Brief for Respondent at 50-51. Another policy of General Electric precluded the hiring of pregnant applicants. Furthermore, until the Gilbert suit, General Electric had a six-month mandatory leave policy for pregnant employees. 375 F. Supp. at 385. A male employee who was partially disabled was accommodated by General Electric with a job he could perform, but pregnant employees were not so accommodated, and had to go on unpaid leave. Brief for Respondent at 86. While discrminatory practices prior to the implementation of Title VII

Brennan points out that under the GE plan the male employee is covered for all risks of disability which he might experience by virtue of his gender. Yet, the female is not covered for all risks of disability she might experience by virtue of her gender. Certainly, one cannot logically conclude that because of the financial limitations of GE which precluded the plan's coverage of every conceivable disability, GE's choice to exclude pregnancy rather than tonsilitis was based on a neutral assessment of the risks.[65] Nonetheless, this is precisely the majority's contention. Indeed, GE feared discriminatory intent would be found and, therefore, introduced data which showed the increased costs which would result from the inclusion of pregnancy disabilities in the plan.[66]

The majority's conclusion that the GE plan does not evidence a discriminatory intent is based on its finding that the plan is

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(July 2, 1965) are not covered by that Act and may be irrelevant to prove discriminatory intent, General Electric's employment practices after that date support the district court's finding of discriminatory intent. The court of appeals did not consider the issue of discriminatory intent.

65. Justice Brennan cited with approval (97 S. Ct. at 416) the district court statement that: "[T]he concern of defendants in reference to pregnancy risks, coupled with the apparent lack of concern regarding the balancing of other statistically sex-linked disabilities, buttresses the Court's conclusion that the discriminatory attitude characterized elsewhere in the Court's finding was in fact a motivating factor in its policy." 375 F. Supp. at 383.

66. Cost considerations do not go to the issue of rebutting discriminatory intent. Such data becomes relevant in the context of a business necessity defense. If a challenged practice is neutral on its face and in its intent, an employer may plead business necessity to rebut a prima facie case of a violation of Title VII established by a showing of discriminatory effect. Robinson v. Lorillard Corp., 444 F.2d 791, 797 (4th Cir. 1971). General Electric did not plead the defense of business necessity; however, the district court considered the data in that context and noted that in addition to being an inappropriate defense (because the General Electric plan was neither neutral on its face nor in intent), cost alone would not sustain the defense. 375 F. Supp. at 382 (citing Robinson v. Lorillard Corp., 444 F.2d at 799 n.8). The test for business necessity enunciated in *Robinson* is whether there exists an overriding legitimate business purpose such that the practice is necessary for the safe and efficient operation of the business. Thus, the business purpose must be

> sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

444 F.2d at 798. General Electric had a less restrictive alternative whereby the disability payments could have been allocated in a manner that would not leave pregnant employees totally unprotected. The district court noted the issue involved was not whether to force General Electric to increase its cost for disability payments, but whether to require nondiscriminatory distribution of the payments. 375 F. Supp. at 382. The court of appeals found the cost evidence irrelevant because it was not pleaded as a business necessity defense, and because the court held that business considerations are insufficient to preclude a finding of discriminatory intent. The court of appeals pointed out that Congress refused to recognize such business considerations when it enacted the Equal Pay Act and similarly did not intend to do so under Title VII. 519 F.2d at 667 n.23 (citing U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess., 687, 689 (1963)).

merely the result of neutral criteria which distinguish pregnancy from the covered disabilities. Brennan summarily dismisses voluntariness as a basis for distinction.[67] Since the plan covers other voluntarily induced disabilities such as sport injuries, venereal disease, and elective surgery, Brennan rejects this criterion as the basis of GE's exclusion of pregnancy. Some of the examples chosen by Brennan, however, are distinguishable from pregnancy on a voluntary basis. When a woman chooses to become pregnant she is also voluntarily assuming the accompanying disability.[68] But an individual who voluntarily elects to participate in a given sport or to have sexual relations does not contemplate incurring disabilities which might result from such activity. However, the GE plan included disabilities resulting from elective cosmetic surgery, hair transplants, and vasectomies, which totally defeats the voluntariness argument. Furthermore, the plan covered disabilities sustained in a fight, as well as alcoholism and drug addiction. The claim that pregnancy disabilities are excluded by General Electric because they are voluntary and the above mentioned causes of disabilities are covered because they are involuntary is tenuous at best.[69]

Another questionable conclusion by the majority is that pregnancy is unique because it is not a disease per se.[70] There is an abundance of feeling in the medical community that disabilities caused by pregnancy are indistinguishable from those caused by diseases;[71] however, since the district court made a finding of fact

67. *See* note 41 *supra*.

68. The district court found normal pregnancy, including recuperation, to be disabling for a period of six to eight weeks. 375 F. Supp. at 377.

69. General Electric argued pregnant employees could obtain abortions, citing Roe v. Wade, 410 U.S. 113 (1973), so continued pregnancy was voluntary. Brief for Petitioner at 64, General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976). This reasoning undermines General Electric's argument that conception is voluntary. Furthermore, since abortion is viewed as immoral by many women, General Electric's voluntariness argument is dubious. Since most women work because of need, U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *Why Women Work*, (rev. ed. 1972) (quoted in Geduldig v. Aiello, 417 U.S. at 502 n.5 (Brennan, J., dissenting)), it is inconceivable that by its enactment of Title VII Congress intended women to choose between going childless, even to the point of subjecting themselves to abortion, or giving up their necessary income. *See* 375 F. Supp. at 381-82.

70. 97 S.Ct. at 408.

71. *See* 375 F. Supp. at 376. *But cf.*, Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973) (holding failure to provide disability payments for pregnant employees does not violate Title VII). The Court stated that "pregnancy is neither a sickness nor a disability . . . The fact of its existence demonstrates that a woman is quite healthy and normal . . . ." *Id.* at 245-46. General Electric treated pregnancy as an illness for other aspects of its comprehensive employee protection plan. A voluntary leave of absence by a pregnant employee is classified as Illness-Pregnancy and is treated as an absence due to illness except for disability payments. GE Health Bulletin re pregnancy leave, issued 11/5/71; Brief for Respondent at 37-40.

that pregnancy per se is not a disease,[72] the Court was constrained by that finding. But beyond the mere labelling of the GE plan as a sickness and accident plan, many of the covered disabilities similar to pregnancy do not literally fall within those terms, e.g., vasectomy, plastic surgery, attempted suicide, hair transplants, or injuries sustained during a fight or the commission of a crime. Furthermore, Brennan notes the district court finding that approximately ten percent of pregnant women experience physically disabling miscarriages, and another ten percent sustain serious complications from pregnancy,[73] both of which may be justifiably characterized as diseases which are not voluntarily assumed, yet both are excluded from the GE plan. Of the latter ten percent, approximately five percent entail diseases related to the physiological state of pregnancy, for example, toxemia, and the remaining five percent are diseases experienced by nonpregnant persons but may be induced by factors associated with pregnancy, such as weight gain, high blood pressure, and diabetes.[74] Nevertheless, the GE plan precluded coverage for these diseases as well as for disabilities accompanying normal pregnancy where the employee has already begun a period of maternity leave.[75] The majority avoids this issue entirely and by so doing illogically uses *Geduldig* as precedent upon which to base their holding. *Geduldig* specifically dealt with a disability plan which omitted coverage for disabilities arising from *normal* pregnancy only. It appears highly imprudent to use *Geduldig* as a catch-all for all pregnancy-related disabilities without discussing the twenty percent of pregnancies which are abnormal, especially in light of the way the GE plan works. Under the plan, the moment a female employee begins maternity leave, she is not entitled to any disability payments. Therefore, if she experiences any disability whatsoever, (not just the twenty percent discussed, *supra*) she remains uncompensated. For example, if the pregnant employee is involved in an automobile accident while on maternity leave, she is precluded from receiving payments, but had she been involved in the same accident while temporarily laid off from work or on personal leave, she would be entitled to disability payments.[76] In con-

72. 375 F. Supp. at 377.

73. *Id.*

74. *Id.* at 376-77.

75. One plaintiff took maternity leave then experienced a pulmonary embolism (blood clot in the lung) which was unrelated to her pregnancy. She was denied disability benefits by General Electric for the period of her disability caused by the embolism. 97 S.Ct. at 404 n.4.

76. In contrast, disability coverages would continue to include any non-pregnancy related disabilities occurring within thirty-one days after the employee went on leave because of a layoff, strike or personal reason. Brief for Respondent at 13-15.

trast, a male employee temporarily laid off or on a leave of absence would receive benefits for any disability he experienced within thirty-one days of ceasing active work. Whatever arguments are made by the majority to justify the exclusion of disabilities arising from normal pregnancy, they are not viable for complications of pregnancy or disabilities incurred while on maternity leave. The *Geduldig* test for discrimination quoted throughout the majority opinion is whether "[t]here is no risk from which men are protected and women are not."[77] Surely, excluding coverage for women on maternity leave for risks totally unrelated to pregnancy and covering men for such risks under all circumstances whether on leave or not, flies in the face of the *Geduldig* test.

Brennan next addresses the most puzzling portion of the majority opinion. In contrast to establishing a violation of equal protection, a Title VII violation may be established by the discriminatory effect of a plan neutral on its face and in its intent.[78] The majority obscures its application of the *Griggs* effect test and appears to refute its validity. Indeed, Justices Stewart and Blackmun, while joining in the result reached by the majority, fail to concur in the portion of the opinion which appears to refute the *Griggs* effect test. Justice Stewart, however, disagreed with Justice Blackmun that there was any suggestion of abandonment of the *Griggs* test.[79] *Griggs* involved the administration of an employment test and the require-

77. 97 S.Ct. at 409 (citing 147 U.S. at 496-97).

78. *See* Washington v. Davis, 96 S.Ct. 2040 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *McDonnell* an employee claimed he failed to be rehired because of racial discrimination in violation of section 703(a)(1) of Title VII. The Court stated the plaintiff must establish a prima facie case of racial discrimination and such a case could be established by showing:

> i) that he belongs to a racial minority; ii) that he applied and was qualified for a job for which the employer was seeking applicants; iii) that, despite his qualifications, he was rejected; and iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The Employer must then establish a nondiscriminatory explanation for failing to rehire the employee. The Court stated that the employee could introduce racial statistics to establish that his rejection "conformed to a general pattern of discrimination against blacks" by his employer. 411 U.S. at 802-05. The majority, 96 S.Ct. at 417, used a *"but cf.,"* citation to *McDonnell* after stating a violation of Title VII did not require proof of discriminatory intent. As Justice Brennan points out, *McDonnell* allows proof of discriminatory effect in a private non-class Title VII action. 96 S.Ct. at 417 n.6.

79. Justice Blackmun rejects any implication by the majority that the *Griggs* effect test is no longer viable for determining Title VII discrimination; rather, he finds the plaintiffs failed to prove discriminating effect. Justices Blackmun and Stewart concurred in the majority's result but refused to overrule the *Griggs* effect test. Their opinions are more puzzling than the majority opinion, however: since the majority result can only be reached by refuting the effect test, the Justices' opinions are illogical.

ment of a high school diploma by a private employer for purposes of employment and transfer. The Court found a prima facie violation of Title VII since the requirements precluded a disproportionate number of blacks. Proof of discriminatory intent was deemed unnecessary by the Court when the consequences of the employment plan operated "invidiously to discriminate on the basis of racial or other impermissible classification."[80]

Furthermore, in *Washington v. Davis*,[81] decided just four months prior to *General Electric*, the Court expressly stated "we have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII and we decline to do so today."[82] *Washington* concerned the validity of a qualifying examination to obtain employment as a police officer under the due process clause of the fifth amendment. The Supreme Court reversed the Court of Appeals because it had applied the *Griggs* effect test to evaluate the constitutionality of the facially neutral examination. The Court held the disparate racial impact of the examination was insufficient to prove a violation of the fifth amendment. A showing of discriminatory intent on the part of the police department which the plaintiff failed to establish was necessary to activate strict judicial scrutiny of the challenged police procedure. The Court distinguished Title VII by stating "under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purposes need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices."[83]

In light of the holdings in *Griggs* and *Washington* it seems anomalous for the majority to employ a fourteenth amendment standard to determine whether discrimination exists in a Title VII case.[84] Under the guise of applying the *Griggs* effect test, the Court in essence rejects the test as a tool for determining discrimination. Adhering to its conceptual framework of focusing on the covered

80. 401 U.S. at 431. The employer in *Griggs* failed to establish the business necessity defence because there was no showing the requirements bore a "demonstrable relationship to successful job performance." *Id.*

81. 96 S.Ct. 2040 (1976).

82. *Id.* at 2047.

83. *Id.* at 2051.

84. Justice Brennan criticized as superfluous and contradicted by *Washington* the majority implication that the fourteenth amendment standard of discrimination is coextensive with the Title VII standard. 97 S.Ct. at 417 n.6. Since the majority could have used the same analytical approach and reached the same conclusion without such an assertion, Justice Brennan appears correct. However, this dictum may be merely the foreshadowing of requiring stricter standards of proof to establish a prima facie violation of Title VII.

disabilities, the Court leaves itself no option but to find the GE plan neutral in its effect. The majority simply reiterates the *Geduldig* test[85] used for facial evaluation and relabels it an "effect test." Consequently, just as it finds the GE plan to be facially neutral, it finds the "effect" of the plan to be neutral.[86] The *Griggs* test necessarily requires an examination of the consequences of the GE plan on female employees. Such an examination would look at the disabilities which are excluded as well as included by the plan. Just as one cannot look at an employment test determined to be facially neutral and conclude there is no discriminatory effect because all of the blacks who have qualified under the test have the same employment opportunities as the whites who have qualified, one cannot say a disability plan which is determined to be facially neutral is not discriminatory in effect because all disabilities qualifying under the plan provide the same benefits to male and female employees. Discriminatory effect of an employment test means the facially neutral employment test results in a disproportionate number of blacks failing it. Similarily, discriminatory effect in a purportedly neutral disability plan means women face a disproportionate risk of uncompensated absence due to pregnancy.[87] Furthermore, there appears to be a fundamental error in the majority's treatment of males and females equally with respect to disabilities when, because of physical characteristics, disabilities incurred by the two genders must necessarily differ.[88] Sex discrimination results

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85. *See* note 77 and accompanying text *supra.*

86. 97 S.Ct. at 408-09. Justice Brennan noted the plan had three discernible effects. The plan included: 1) all disabilities which may be incurred by both sexes; 2) all male-specific disabilities; 3) all female-specific disabilities except for pregnancy. The majority failed to consider the impact of the second and third effects. 97 S.Ct. at 417-18.

87. This becomes apparent upon consideration of the purpose of an employment benefit plan, which is to protect the employee from financial disaster when she is unable to work. The fact that not all female employees face the risk of pregnancy does not alter the conclusion. Since only females are penalized by incomplete disability coverage, sex discrimination exists. *See* Note, *Title VII, Pregnancy and Disability Payments: Women and Children Last,* 44 GEO. WASH. L. REV. 381, 395 (1976).

For a discussion of sex discrimination under Title VII, see Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964,* 1968 DUKE L. J. 671.

Furthermore, in failing to consider the effect of the plan on employees who incur nonpregnancy related disabilities while on maternity leave, the majority reaches the wrong conclusion even on its own terms.

88. To avoid sex discrimination under Title VII an employer must treat his female and male employees differently for some purposes, for example, maintaining separate facilities. "To the extent the sexes are essentially different, an employer discriminates on the basis of sex by requiring one sex to sacrifice the basic difference to a greater degree than he requires of the opposite sex." 1968 DUKE L. J., *supra* note 87, at 692. This was the district court's contention rejected by the majority that "if it [inclusion of pregnancy disability benefits]

from the plan's failure to recognize the unique condition of pregnancy experienced by the female. Yet, it is precisely this uniqueness that the majority uses as a basis for finding the plan to be neutral.[89]

In support of its effect analysis, the majority refers to the statistical data supplied by General Electric which indicated that in the two previous years the average cost per insured female employee exceeded such costs for the male employee.[90] The district court rejected General Electric's data as being inadequate to "draw any precise conclusions as to the actuarial value of the coverage provided under the present plan . . . ."[91] The majority uses the negative inference of this statement to conclude "as there is no proof that the package is in fact worth more to men than women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits."[92] In addition to the questionable validity of the statistics introduced,[93] the majority's reliance on this data is

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be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence." 375 F. Supp. at 383.

89. 97 S.Ct. at 410.

90. *Id.* at 405 n.9, 409.

91. 375 F. Supp. at 382-83. The district court considered the statistical data in the context of the business necessity defense. Since General Electric did not plead the defense, the court of appeals considered the data irrelevant. 519 F.2d at 667.

92. 97 S.Ct. at 409. The Court noted that General Electric was not required by law to supply any disability benefits to its employees. Therefore, if General Electric terminated its disability plan and paid all its employees a flat increase (which was the cost of the disability insurance), no discrimination would exist, although female employees would have to pay more than male employees to procure comprehensive disability insurance. 97 S.Ct. at 409-10 n.17. (But General Electric did not pay a flat fee for employee insurance coverage as a self-insurer and the company made payments on the basis of individual claims.) The fallacy with this argument is twofold. Even though Title VII does not require an employer to adopt particular employment practices, once he does so, such practices may not be discriminatory. Furthermore, while insurance companies may validly draw distinctions on the basis of actuarial data using sex as a factor, private employers under Title VII may not necessarily do the same. *See* 84 HARV. L. REV. at 1172-76. In Manhart v. City of Los Angeles, 45 U.S.L.W. 2286-87 (9th Cir. Nov. 23, 1976), the Ninth Circuit found an employment practice which required female employees to contribute fifteen percent more than their male counterparts to a retirement plan, on the basis of their greater life expectancy, unlawful under Title VII. Since the actuarial distinction was based wholly on sex, the plan precluded treating each employee as an individual, which is required by Title VII. For a discussion of insurance classifications by sex, see Comment, *Gender Classifications in the Insurance Industry*, 75 COLUM. L. REV. 1381 (1975); Bernstein & Williams, *Title VII and the Problems of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203 (1974).

93. The district court stated, "[t]he Court gives no weight to the suggestion that the actuarial value of the coverage now provided is equalized as between men and women." 375 F. Supp. at 382. General Electric's calculations were based upon the premise that although the average duration of claims for both sexes were comparable, the average cost per female was higher because more females were absent. The amount of disability payments actually paid, however, was higher for a disabled male employee than a female employee. The average

inconsistent with the recognized purposes of Title VII. If Title VII mandates that employment policies reflect individual treatment for employees rather than the imputation of group statistics to an individual employee, there is something inherently wrong with allowing an employer to refuse to cover an individual employee for a disability because members of her sex, on the average, receive as much in disability payments as their male counterparts. Furthermore, when the only statistics used by General Electric to differentiate group costs are based on gender rather than neutral criteria such as age and occupation level, the inescapable conclusion is that the resulting disability plan has a differential impact on the two sexes. In effect, the majority has written "effect" out of this Title VII case.

Brennan maintains that since discrimination has no absolute meaning, but is rather defined in a social context, it must be examined in view of the social goals contemplated by the Civil Rights Act.[94] Such goals comport with considering the unique situation encountered by protected individuals. Brennan refers to *Lau v. Nichols*,[95] which concerned the alleged unequal educational opportunities for Chinese speaking students, who failed to receive English language instruction. The Court held that the failure of the school board to provide adequate instruction to deal with this disability deprived the students of a meaningful opportunity to participate in the public education program and violated Title VI of the Civil Rights Act of 1964.[96] In addition, reacting to the courts' refusal to require accommodation for employees' religious needs by employers, Congress recently articulated the need for such accommodation by amending Title VII.[97] Since Congress had intended such accommodation from Title VII's inception, the amendment has been applied retroactively by the courts.[98] In light of the foregoing, it appears that the Title VII concept of non-discrimination towards women includes employee treatment consistent with their unique

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female employee's salary was lower, because females occupy lower level jobs at General Electric. Studies show that employees who occupy lower level jobs have a greater rate of disability claims. *See* S. RIESENFELD, TEMPORARY DISABILITY INSURANCE 84, 84-6 (University of Hawaii, Legislative Reference Bureau Report No. 1, 1969); Brief for Respondent at 145-51, 58-59 n.16.

94. 97 S.Ct. at 419-20.

95. 414 U.S. 563 (1974).

96. *Id.* at 568; *see* 42 U.S.C. § 2000d (1970).

97. 42 U.S.C. § 2000e(j) (1972): "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

98. Brief for Respondent at 131; *see* Riley v. Bendix Corp., 464 F.2d 1113, 1116-17 (5th Cir. 1972).

physical characteristics, especially where, as in the instant case, the employer has accommodated all the uniquely male characteristics.[99]

Brennan's final argument deals with the majority's rejection of the EEOC guideline as a proper interpretation of the congressional intent behind Title VII. In the 1972 amendments to Title VII, Congress recognized that discrimination is often manifested in subtle forms. Therefore, it entrusted the detection of discriminatory employment practices to the expertise of the EEOC.[100] In view of the conspicuous lack of legislative history surrounding the inclusion of sex within the ambit of Title VII, views of the administrative agency charged with interpreting the Act should be given due regard. Brennan notes several Supreme Court cases which have held that EEOC guidelines are entitled to "great deference."[101] In contrast to the majority, Brennan views the time lapse between the enactment of Title VII and the promulgation of the EEOC guideline as necessary for the detailed economic and social analysis engaged in by the EEOC in formulating the guideline. Furthermore, he cites the inconsistency of the EEOC's prior position with the guidelines as a meritorious consequence of the in depth analysis undertaken by the EEOC.[102] Brennan contends that the EEOC wished to avoid the premature imposition of the requirement that employers include

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99. *See* 97 S.Ct. at 420; note 88 *supra*.

100. *See* H.R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2144.

> Employment discrimination as we know it today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs . . . . In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.

S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971).

101. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971).

The Court rejected an EEOC guideline in Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), because it found the guideline to be clearly inconsistent with congressional intent. *Espinoza* involved the interpretation of "national origin" in Title VII. The EEOC guideline prohibited employer discrimination on the basis of citizensip. Since Congress enacted a related section banning discrimination on the basis of national origin under Title VII, intending to follow the historical practice of requiring citizenship for federal employment, the Court declined to read a broader meaning into "national origin" for purposes of private employment.

102. 97 S.Ct. at 418-19; *see* 30 Fed. Reg. 14927 (1965), in which the EEOC prior to promulgation of its sex discrimination guidelines stated that it had "little legislative history to serve as a guide" and, therefore, would require extensive studies to determine the course it would take to protect women. No guidelines on pregnancy were promulgated by the EEOC until 1972. 37 Fed. Reg. 6835 (1972). The court of appeals had cited criticism of the EEOC guidelines and had stated its decision was based not only on those guidelines but on its view of congressional intent as clearly mandating similar treatment for both sexes under employment disability plans. 519 F.2d at 664-65 & n.12.

pregnancy related disabilities in their plans and views the guideline as comporting with recent governmental policies which seek to alleviate the financial strain encountered by the pregnant employee.[103] Such policies serve to promote the total integration of women into the labor force, and promote the remedial purposes of Title VII.

The implications of the *General Electric* decision are manifold. The case may represent the end of the *Griggs* effect test as a means for establishing that a facially neutral employment practice violates Title VII. Discriminatory intent, which entails a more difficult level of proof than does discriminatory effect, would then become the relevant test in Title VII actions. Thus, the standards for Title VII and equal protection analysis would be analogous. Equating a constitutional standard, which has heretofore been considered more stringent, with a statutory standard will significantly reduce the number of employment practices which can be successfully challenged. In light of Congress' broad design of Title VII, which was intended to protect the employee from discrimination because of group membership in all phases of the employment scheme, and Congress' recognition that discrimination often manifests itself in subtle forms,[104] the Court's construction of Title VII in a manner which allows only the most blatant forms of discrimination to be held unlawful conflicts with Congressional intent.

The *General Electric* decision may signify a court created dichotomy under Title VII. Since *Griggs* was a racial case, the Court, consistent with equal protection analysis which accords race and national origin classifications greater protection than gender classifications, may limit the *Griggs* effect test to employment policies which have a disparate impact on a racial group. Such a course taken by the Court would contradict the express language of the statute which equates employment practices which discriminate on

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103. The Railroad Unemployment Insurance Act, 45 U.S.C. § 351 (k)(2) (1970) includes benefits for pregnancy under the definition of sickness. Guidelines paralleling those of the Department of Health, Education, and Welfare (HEW) under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (Supp. II) were approved by Congress and the President. *See* 45 C.F.R. § 86.57(c) (1976). The Office of Federal Contract Compliance (OFCC) issued guidelines on pregnancy discrimination (3 C.F.R. § 169 (1974)) and companies contracting with the government are required to act in accordance with executive orders prohibiting sex discrimination. Exec. Order No. 11,375, 32 Fed. Reg. 14304 (1967), *amending* Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965). These guidelines were unclear as to whether pregnancy leave included eligibility for disability payments; new guidelines following the EEOC guidelines have been proposed. *See* Proposed Revision of 41 C.F.R. § 60-20.3(h)(2), 38 Fed. Reg. 35,338 (1973). The United States Civil Service Commission regulations provide that pregnant federal employees are eligible for sick leave. 5 C.F.R. § 630.401(b) (1977); *Federal Personnel Manual*, Subch. 13, § 13-2 (April 30, 1975).

104. *See* note 100 *supra*.

the basis of sex or religion with those relating to race or national origin.

Finally, *Griggs* involved an employment test[105] and its precedential value may be limited on that basis. Consequently, different employment practices would be analyzed under different standards within the same statutory scheme.

The most likely impact of the *General Electric* decision will be to allow the courts to analyze employment practices which pertain to pregnant employees under different standards than other employment practices: while the *Griggs* effect test will remain a viable tool for the analysis of other Title VII cases,[106] a fourteenth amendment standard of discrimination will be applied to those cases which involve pregnant women. Thus, the test which the Court has announced to determine whether an employment practice discriminates against women itself is discriminatory.

BARBARA UNGAR ROYSTON

Defense of Entrapment Is Denied to a Defendant Who Is Predisposed to Commit a Crime

In Hampton v. United States *the Supreme Court held that the defense of entrapment is not available to a defendant who procured contraband from a government agent if the defendant was predisposed to commit the crime. In this article the history of the defense of entrapment and the reasoning of the divided court in deciding the* Hampton *case are examined in detail. The author concludes that the rule set by the* Hampton *case encourages violation of defendants' rights by police, and that legislative reform may be necessary.*

Charles Hampton made two sales of heroin to federal agents. The heroin was allegedly[1] supplied to Hampton by a Federal Drug En-

105. 42 U.S.C. § 2000e-2(h) (1970) dealt with employment tests. *Griggs* also dealt with the requirement of a high school education for purposes of being hired or transferred.

106. A majority of the Court in *General Electric* still expressed support for the *Griggs* test at least in some instances.

1. The defendant and the government witnesses related two significantly dissimilar versions of events to the jury. Defendant claimed that the DEA informant obtained the drug (which defendant believed to be nonnarcotic) that defendant admittedly thereafter solicited and sold. The government's witnesses testified that Hampton had obtained and supplied what he knew to be contraband. The Supreme Court dealt with defendant's version for purposes of the appeal, and went on to hold this "fact" legally insignificant.